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Human rights and immigration The right to education of foreigners in Spain

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Abstract

Since the recognition of the right to education by the Universal Declaration of Human Rights and a number of treaties and normative instruments, countries have included such a right in their Constitutions. In Spain, the article 27 of the current Constitution recognizes first of all the right of everyone to education as a basic right. Although the laws and their regulations are clear about the possibilities and conditions for foreign people to access to the educational services, difficulties arising in practice entail a permanent concern about the promotion of cultural diversity and intercultural dialogue. So I will consider the evolution of the idea of integration and I will explore the principles of inclusive education.

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1. Introduction

The Spanish Constitution of 1978 (SC) — by which Spanish was constituted as a social and democratic State under the rule of law — expressly indicates that “norms regarding the fundamental rights and freedoms which the Constitution recognizes will be interpreted in conformity with the Universal Declaration of Human Rights and the treaties and international agreements on these same topics ratified by Spain” (article 10).

The right of every person to education is one of those rights which the international documents include, and this right is formally expressed in article 27.1 of the SC, according to which “all persons have a right to education” and “the freedom of instruction is recognized”. In addition, article 13.1 of the SC specifies that foreigners residing in Spain will enjoy public constitutional freedoms, in accordance with the laws and treaties recognized by Spain.

Based on these constitutional pillars, beginning in 1978 diverse laws on education have been promulgated which regulate the right to education for all; in parallel, several laws concerning the rights and responsibilities of foreigners have also been promulgated. These include the right of foreigners to education, together with the rest of their rights.

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As a result, in order to study the conditions of exercise of the right to education and the freedom of instruction of foreigners in Spain, I must make reference to the contents of both types of laws.

2. The right to education in educational and immigration legislation beginning in 1978

The Education Law which developed aspects of the right to education after the ratification of the SC was the *Law Regulating the Charter of Educational Centers* (Ley Orgánica que regula el Estatuto de Centros Docentes - LOECE), promulgated in June of 1980. According to this Law, foreigners residing in Spain have the right to receive — in the same conditions as Spanish citizens — free basic and professional education, as well as higher education (art. 3). With regards to the immigration laws of these years, it must be noted that the regulations were partial. In 1981 a proposed bill failed to pass. It was only in 1985, when two laws which were promulgated at nearly the same time — one educational and one concerning immigration — that the foundations were laid upon which evolution has continued through the present day.

The educational law was the *Law 8/1985, of July 3, Regulating the Right to Education* (Ley Orgánica Reguladora del Derecho a la Educación - LODE). While the LODE involved important changes with respect to the LOECE in aspects which affected the functioning of educational centers, in regards to the rights of Spanish citizens and foreigners there was no great variation. In addition, despite the fact that the LODE has been modified over the years, the changes have not affected the points that regulate the rights of Spanish citizens and foreigners, which continue in force. These are the following (LODE, art. 1):

“1. All Spanish citizens have the right to a basic education that will permit the development of their own personalities and the undertaking of an activity that is useful to society. This education will be obligatory and free at the level of Basic General Education, and, if sought, at the level of the first grade of professional training, as well as at the other educational levels that the Law establishes.

2. All persons, in addition, have the right to access higher levels of education, in accordance with their skills and vocation, and in no case will the exercise of this law be subject to discrimination based on the economic means, social level or place of residence of the student.

3. Foreigners residing in Spain will also have the right to receive the education referred to in sections 1 and 2 of this article”.

The immigration law was the *Law 7/1985, of July 1, Concerning the Rights and Freedoms of Foreigners in Spain*. This law was integrative, and was not intended to merely control flows of migration (Zafra Espinosa de los Monteros, 2002, p. 109), and recognized the right to education, freedom of instruction, and more concretely, the right to the creation and administration of educational centers for those foreigners who legally reside in Spain.

From these two laws it follows that the educational rights of foreigners are equivalent to those of Spanish citizens, provided that the foreigners have the legal condition of “residents”. But the increase in the number of foreigners in Spain due to the migratory phenomenon of recent years has led to greater regulation, expressed in a new law on immigration: the *Law 4/2000, of January 11, Concerning the Rights and Freedoms of Foreigners in Spain and their Social Integration*, which has in turn later been amended.

This Immigration Law broadened the right to education in the following terms (Art. 9):

“1. All foreigners under the age of 18 have the right and obligation to receive education in the same conditions as Spanish citizens, a right which includes:

- access to a basic, free and obligatory education,
- the obtaining of the corresponding academic title
- and access to the public financial aid system.

2. In the case of preschool education, which is voluntary, the Public Administrations will guarantee the existence of a number of places sufficient in order to assure the education of all those members of the population that solicit it.

3. Resident foreigners will have the right to non-obligatory education in the same conditions as Spanish citizens. Concretely, they will have the right to access the levels of education and instruction not covered in the previous section, to obtain the academic titles that correspond to each case, and to have access to the public system of financial aid.

4. The public authorities will undertake to ensure that those foreign residents that need it may receive education to better their social integration, with recognition and respect for their cultural identity.

5. Foreign residents may undertake teaching or scientific research activities in accordance with that established by the laws in force. In addition, they may create and administer educational centers in accordance with that established by the laws in force”.

As can be appreciated, in addition to making explicit many more aspects regarding the exercise of the right to education of foreigners, this law foresees measures of social integration which are respectful of their cultural identity. It is clear that it is not merely a matter of guaranteeing the right to education of foreign minor children, but also of putting into practice new educational approaches which respect the value of cultural diversity (Pérez Sola, 2009, p. 392).

One of the problems which has arisen on the basis of article 9 (section 1) concerns whether non-resident foreigners under 18 have the same right to receive post-obligatory education as Spanish citizens do. This issue, which has been taken to the courts, has been resolved via a Sentence of the Constitutional Court (Sentencia del Tribunal Constitucional - STC 236/2007, of November 7, 2007), finding in favor of their having this right. In this way, a non-resident foreigner who receives his or her Diploma of Obligatory Secondary Studies at, for instance, 16 or 17 years of age, may access high school (*bachillerato*) or a middle grade of Professional Formation (post-obligatory education) and continue up to 18 years of age.

3. Curricular aspects of educational legislation for the integration of foreign students

The laws we have mentioned up to now provide the channel by which persons exercise their right to education; at the same time, other laws have determined organizational and curricular aspects within the school itself. And it is there that the real challenges arise.

Since before the promulgation of the Spanish Constitution, the *General Law of Education and Financing of the Educational System of 1970* (Ley General de Educación y Financiamiento del Sistema Educativo, known as the LGE) contemplated, within the modalities of instruction, special courses for emigrant and foreign students and curricula for other countries. Later, the *Law 1/1990, of October 3, of General Ordering of the Educational System* (Ley Orgánica de Ordenación General del Sistema Educativo, or LOGSE), without making express mention of “foreign” or “immigrant” students, required the compensation of inequalities for those persons or groups which for social, economic, cultural, geographic, ethnic or other reasons are in an unfavorable situation (articles 63 and 64).

But both the LGE as well as the LOGSE have been repealed, and the law currently in force is the *Law of Education 2/2006, of May 3* (Ley Orgánica de Educación, or LOE). In article 80 of this law, the text of the LOGSE is repeated almost word for word regarding the compensation of inequalities. In the LOE, allusion is made to “attention to the diversity” common to all students, and therefore, just as in the LOGSE, foreign students do not receive differentiated treatment. There is a reference in the LOE to the *Law on Rights and Freedoms of Foreigners* of 2000, which updates the specifications of education for foreigners, and which has been discussed in the prior section of this article. There is, in addition, another reference to immigrant persons in article 67, corresponding to education for adults, where specific training programs are foreseen in the culture and languages spoken in Spain (Castilian Spanish and other co-official languages of the Autonomous Communities). All of this is intended to facilitate their integration (LOE, art. 67.4).

According to provisional data published by the Ministry of Education, at the end of the 2007-08 academic year, 8.75% of registered students in Spain (from preschool to *bachillerato* and Professional Formation) were foreigners. This contrasts with the figure of 0.99% for 10 years earlier, in the 1997-98 academic year (Forum for the Integration of Immigrants - Foro para la Integración de los Inmigrantes, 2009, pp. 1-4), and with the provisional data from the 2009-10 academic year, which registers a level of 9.7% of foreign students (Ministry of Education, 2009a). In the face of the cultural diversity that this enormous increase involves — as a result of the reception of foreign students from very diverse geographic origins — an integrative response has been attempted, with approaches that have undergone evolution.

While the LOE does not treat foreign students as a special class, it does mention those students who either come from other countries or who, for other reasons, are incorporated late into the Spanish educational system. It is recommended that, when they enter the school system, their knowledge, age and academic history be taken into account, in order that they may enter the grade which is best adapted to their situation, and that they should also receive any necessary aid. And this is where specific programs are proposed for those students who have important deficiencies, due either to language difficulties or other causes. The Educational Administrations of the

corresponding Autonomous Communities also have the obligation of providing advising concerning the rights and obligations of students, as well as the opportunities which the educational system offers them (LOE, art. 78).

From this integrating perspective, the means of compensation of inequalities do not distinguish between Spanish citizens and foreigners, but rather are aimed directly at the difficulties and problems of learning that any student may have for various reasons, as we will see in the following section.

4. Some programs and actions for integration as part of inclusive education

On the part of the Ministry of Education, the current measures for carrying out this integration are made concrete in actions such as: *Reinforcement, Orientation and Support Programs* (Programas de Refuerzo, Orientación y Apoyo, or PROA), an annual program of awards to those centers which develop actions directed at the compensation of inequalities in education, an annual program of subsidies to private non-profit institutions for the development of actions for the compensation of inequalities, the Portuguese Language and Culture Program, the Arab Language and Moroccan Culture Program, the Gypsy People, the Program of Mobile Classrooms for Circuses and the MUS-E Program (which contributes to social integration via the arts). There also exists the Resource Center for Attention to Culture Diversity in Education (Centro de Recursos para la Atención a la Diversidad Cultural en Educación, or CREADE) (Forum for the Integration of Immigrants - Foro para la Integración de los Inmigrantes, 2009, pp. 17-18).

While for reasons of space I will not undertake a detailed analysis of these programs, it should be noted that they are foreseen as part of the “inclusive education” that the Ministry of Education has explicitly committed to. It is by this means that the Ministry seeks to ensure that “quality” and “equity” are combined, so that equal opportunities are fostered via academic excellence. It should not be forgotten that the index of scholastic failure in Spain is near 30%, and that there are notable inequalities between Autonomous Communities (Sotés-Elizalde, 2008, Moré, 2009, pp. 2-3). Inclusive education implies that each student should attain the maximum development possible for him or her, independently of origin, with all students treated equally, and including those students who are incorporated into the school system late, as well as students with special educational needs and those with high intellectual capacities (Ministry of Education, 2009b).

It should be noted, on the other hand, that the regulations which we have seen up to now for Spain are consonant with UNESCO and EU recommendations, for example in the *Universal Declaration on Cultural Diversity*, which recognizes diversity as part of the common patrimony of humanity (UNESCO, 2001) and in the *Green Paper: Migration & Mobility: Challenges and Opportunities for EU Education Systems*, which highlights the importance of social inclusion (Commission of the European Communities, 2008). In this document there is a commitment to “intercultural education”, and immigration is understood as something valuable and enriching (Peñalva Vélez & Sotés Elizalde, 2009).

5. Conclusions

Issues relating to the exercise of the right to education of foreigners in Spain have become particularly relevant in recent years, in parallel with the increase in the reception of immigrant persons, and the education system has sought to adapt itself to these changes by undertaking measures for fostering the social and scholastic integration of foreigners.

The fact of being a foreign student does not necessarily imply lower scholastic performance, but it is necessary to ensure that this does not occur, especially when the student's language of origin is different from that of the Autonomous Community where he or she is being schooled. On occasions, the knowledge that these students bring is far from being limited, but is different from that imparted in the receiving country. It is also necessary to pay attention to cultural differences, and governments must both appreciate cultural diversity as something valuable and foster interculturality.

The exercise of rights by foreigners does not only imply access to schooling, but also that the educational system must make an effort to foster the maximum development of the potentialities of each student. The principles of inclusive education may be valid for the integration of foreigners, since individual and cultural differences are understood as contributions and opportunities for development.

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